

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARTIN FRUTOS, JR.,

Plaintiff,

No. CIV S-04-2361 GEB EFB P

vs.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS, et al.,

Defendants.

ORDER

Plaintiff is a state prisoner proceeding pro se and *in forma pauperis* with an action filed pursuant to 42 U.S.C. § 1983. On September 27, 2006, plaintiff filed a request for reconsideration of the order filed September 13, 2006, wherein the court found that plaintiff's complaint did not state a cause of action against defendants D.L. Runnels, Roy Castro, and Cal Terhune. Plaintiff has subsequently, however, moved for leave to file an amended complaint, together with a proposed amended complaint. Plaintiff's motion for reconsideration in this regard will therefore be denied as moot.

Plaintiff also moves for reconsideration of the court's denial of his request for the appointment of counsel. Plaintiff requests that the court appoint Herman Franck to represent him in this action. If Mr. Franck has agreed to represent plaintiff, the court's appointment is unnecessary. Herman Franck should file a notice of substitution of counsel with the court

1 pursuant to Local Rule 83-182(e). If Mr. Franck is not willing to undertake representation, the  
2 court cannot appoint him to do so. Plaintiff is advised that in § 1983 cases, the appointment of  
3 counsel does not include payment for counsel's services. Thus, any appointed counsel must be  
4 willing to handle the case on a pro bono basis, with the possibility of attorney fees only if the suit  
5 is successful, as provided for in 42 U.S.C. § 1988. Moreover, although 28 U.S.C. § 1915(d)  
6 allows the court to request that an attorney represent an indigent civil litigant, in this circuit, the  
7 exercise of that discretion is limited to cases presenting "exceptional circumstances." *Aldabe v.*  
8 *Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). At this time, the court does not find the existence  
9 of exceptional circumstances justifying the appointment of counsel. Thus, plaintiff's request for  
10 the appointment of counsel is denied. This denial is without prejudice to plaintiff's right to bring  
11 this motion again at a later stage of the proceedings.

12 Plaintiff's amended complaint states a cognizable claim for relief pursuant to 42  
13 U.S.C. § 1983 and 28 U.S.C. § 1915A(b). If the allegations of the amended complaint are  
14 proven, plaintiff has a reasonable opportunity to prevail on the merits of this action.

15 In accordance with the above, IT IS HEREBY ORDERED that:

- 16 1. Plaintiff's September 27, 2006, motion for reconsideration is denied.
- 17 2. Service is appropriate for the following defendants: Reed, Hubbard, Wagner,  
18 Stone, Colon, Porter, Rianda, Castro, Runnels, and Terhune.
- 19 3. The Clerk of the Court shall send plaintiff 10 USM-285 forms, one summons,  
20 an instruction sheet and a copy of the amended complaint filed October 18, 2006.
- 21 4. Within thirty days from the date of this order, plaintiff shall complete the  
22 attached Notice of Submission of Documents and submit the following documents to the court:
  - 23 a. The completed Notice of Submission of Documents;
  - 24 b. One completed summons;
  - 25 c. One completed USM-285 form for each defendant listed in number 1  
26 above; and

1 d. Eleven copies of the endorsed amended complaint filed October 18,  
2 2006.

3 5. Plaintiff need not attempt service on defendants and need not request waiver of  
4 service. Upon receipt of the above-described documents, the court will direct the United States  
5 Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4  
6 without payment of costs.

7 DATED: November 13, 2006.

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9 EDMUND F. BRENNAN  
10 UNITED STATES MAGISTRATE JUDGE  
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NOTICE OF SUBMISSION  
OF DOCUMENTS

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Plaintiff hereby submits the following documents in compliance with the court's  
order filed \_\_\_\_\_:

\_\_\_\_\_ completed summons form

\_\_\_\_\_ completed USM-285 forms

\_\_\_\_\_ copies of the \_\_\_\_\_  
Amended Complaint

DATED:

\_\_\_\_\_  
Plaintiff